THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-124223-A (Jan. 30, 2013) – Claimant who quit her job due to an unlawful compensation arrangement had good cause attributable to the employer to resign within the meaning of G.L. c. 151A, § 25(e)(1), even though she never asked the employer to address her wage concerns.

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant resigned from her position with the employer on February 28, 2012. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 2, 2012. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on August 13, 2012. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, was not disqualified, under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, which comprised of more than six hours of testimony, the review examiner's decision, and the employer's appeal.

The issue on appeal is whether the claimant, who left her employment due to an unlawful compensation arrangement, had good cause attributable to the employer to resign within the meaning of G.L. c. 151A, § 25(e)(1), even though she never asked her employer to address her wage concerns.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked full-time as the Operations Manager for an electrical contractor, from January 15, 2007 until February 28, 2012, when the claimant left the employer.

2. The claimant left the employer because the employer would not pay the claimant for overtime hours worked by the claimant that exceeded forty (40) hours during a single week, and for alleged sexual harassment by the employer's Company President.

3. The employer hired the claimant to work forty (40) hours each [sic] for a gross weekly salary of $1,200.00.

4. During the claimant's employment, the Company President became dissatisfied with the quality of the claimant's work, and that the claimant did not consistently work at least forty (40) hours each week, and so criticized the claimant. Consequently, the Company President decided to pay the claimant an hourly wage of $30.00 for those weeks in which the claimant worked fewer than forty (40) hours, and no more than $1,200.00 for those weeks in which the claimant worked more than forty (40) hours. This alteration in the claimant's pay structure caused the claimant to leave the employer.

5. The claimant also left the employer because as of the summer of 2009, the Company President allegedly: stared at the claimant "inappropriately, below to up;" adjusted his "private parts" in the claimant's presence; reached over the claimant's chair and brushed against the claimant; conversed with the claimant while the Company President was lounging on the office couch.

6. The Company President did not: stare at the claimant "inappropriately, below to up;" adjust his "private parts" in the claimant's presence; reach over the claimant's chair and brush against the claimant; converse with the claimant while the Company President was lounging on the office couch.

7. During the claimant's employment, the Company President made it clear to the claimant and all employees that overtime had to be approved by the Company President on a case by case basis, because overtime expenses had a negative effect on the employer's profitability once a work contract had been entered into and its cost fixed.

8. On or about February 14, 2012, the claimant informed the employer's Corporate Counsel that the claimant felt "uncomfortable" at work and she had concerns about her compensation.

9. Thursday, February 16, 2012, was the claimant's last day of work.

10. On February 23, 2012, the employer's Corporate Counsel contacted the claimant's attorney to propose that an independent investigator interview the claimant and other interested parties to determine what could accommodate and satisfy the claimant's concerns about her employment.

11. In the meantime, the claimant was on a paid leave of absence from work as of February 17, 2012, until February 28, 2012.

12. On February 28, 2012, the claimant declined the Corporate Counsel's offer of an independent investigation because neither the claimant nor the claimant's attorney believed that such an effort would be productive. At that time, the claimant resigned her position effective immediately.

Ruling of the Board

The Board adopts the review examiner's findings of fact with the exception of the portion of finding of fact #3 that provides that the claimant was hired as a salaried employee[1]. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(1), provides, in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . .

On appeal, the employer asserts that the claimant is not entitled to benefits, because she failed to afford the employer an opportunity to address her wage concerns prior to resigning. Ordinarily, an employee who voluntarily leaves employment due to an employer's action has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Director of Division of Employment Security, 393 Mass. 89, 93-94

[1] The claimant provided undisputed testimony that she was hired as an hourly employee and that she became a salaried employee in 2009. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Director of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

(1984). However, we do not agree that such efforts to preserve are necessary where an employer withholds a portion of a claimant's earned hourly wage or full salary.

G.L. c. 149, § 148, provides, in relevant part, as follows:

> Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned . . . No person shall by a special contract with an employee or by any other means exempt himself from this section or from section one hundred and fifty. The president and treasurer of a corporation . . . shall be deemed to be the employers of the employees of the corporation within the meaning of this section.

The review examiner found that, because the company president was dissatisfied with the quality of the claimant's work and felt that the claimant did not consistently work forty hours a week, he decided to compensate her at an hourly rate for those weeks when she worked fewer than forty hours and to compensate her at a fixed salary for weeks when she worked more than forty hours. This is supported by payroll records, appearing in exhibits 8 and 16.[2] The review examiner further found that this pay scheme caused the claimant to leave her job. We see no reason to disturb these findings.

In its appeal, the employer asserts that it had no knowledge whatsoever of the claimant's concern that she was not being paid overtime. At the hearing, the company president and treasurer testified that the claimant never asked for overtime pay, that he routinely signed paychecks or authorized the use of his stamped signature without looking at the number of hours worked, and that since it was the claimant's responsibility to process the payroll, she paid herself this way voluntarily. Even if true, none of these assertions provides a defense to an employer who fails to pay earned wages.

The Massachusetts wage statute expressly provides that an employee may not agree to be exempt from the requirement to pay all earned wages. G.L. c. 149, § 148; Awuah v. Coverall North America, Inc., 460 Mass. 484, 498-499 (2011) ("where a statute . . . rests upon grounds of public policy, it is not in the power of one who may be directly affected by it to contract in advance that it may be disregarded") (citations omitted). Moreover, whether the employer knows of its employee's wage concerns or knows that it is not paying for all hours worked makes no difference. An employer's violation of the wage statute is a strict liability offense. *See* G.L. c. 149, §§ 27C(a)(2) and 150[3]; Somers v. Converged Access, Inc., 454 Mass. 582, 591 (2009) (wage act is a strict liability statute).

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[2] The claimant's timesheets and pay stubs, while not explicitly incorporated into the review examiner's findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. Id.

[3] None of the statutory defenses set forth under G.L. c. 149, § 150, have been asserted in this appeal.

If the employer was dissatisfied with the claimant's performance or attendance, it was free to exercise disciplinary measures, but it could not withhold earned pay. Awuah, 460 Mass. at 493. We have previously held that an employer's violation of the Massachusetts wage statute constituted good cause attributable to the employer to resign, qualifying the claimant for benefits, under G.L. c. 151A, § 25(e)(1). *See* BR-116407-A (May 20, 2011) (employer's failure to pay wages to the claimant for the time spent taking a mandatory drug test constituted good cause for the claimant to separate from employment). In light of the evidence and the review examiner's findings of fact, we similarly hold in this appeal.

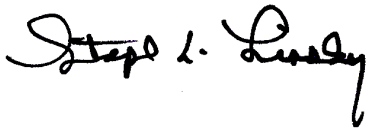
Even if the claimant could be classified, under G.L. c. 151, § 1A, as an exempt salaried employee who was not entitled to overtime pay, she had good cause to quit because, on a regular basis, the employer failed to pay her full $1,200 a week salary. *See* 29 C.F.R. § 541.602(a).

We, therefore, conclude as a matter of law that the claimant had good cause attributable to the employer to resign within the meaning of G.L. c. 151A, § 25(e)(1), due to the employer withholding earned pay, and that she was under no obligation to bring the violation to the employer's attention prior to her resignation.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending March 3, 2012 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - January 30, 2013

John A. King, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- March 1, 2013

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

ab/ jv